

IN THE COURT OF APPEALS OF IOWA

No. 2-1110 / 10-0844
Filed January 9, 2013

THANH DAO,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael Huppert,
Judge.

An applicant appeals the district court decision finding his application for
postconviction relief from his conviction for first-degree murder was untimely.

AFFIRMED.

Ronald W. Kepford, Winterset, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and George Karnas, Assistant
County Attorney, for appellee State.

Considered by Doyle, P.J., Bower, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

SCHECHTMAN, S.J.**I. Background Facts & Proceedings**

Thanh Dao was convicted of first-degree murder, in violation of Iowa Code section 707.2 (1997). The State alleged Dao and a co-defendant had participated in the drive-by fatal shooting of Monty Thomas. Dao was tried under alternative theories of (1) deliberation, premeditation, and specific intent to kill (section 707.2(1)), and (2) felony murder (section 707.2(2)), with the underlying felony being terrorism.¹ He was sentenced to life imprisonment on April 23, 1999. The conviction was affirmed on direct appeal. *State v. Dao*, No. 99-0727, 2001 WL 246444 (Iowa Ct. App. Mar. 14, 2001). *Procedendo* was issued on June 28, 2001.

Dao filed an application for postconviction relief on November 15, 2001, claiming ineffective assistance from trial and appellate counsel. The district court denied his application. Dao's appeal therefrom was dismissed as frivolous under Iowa Rule of Appellate Procedure 6.1005. *Procedendo* for that appeal was issued on July 21, 2006.

Dao filed a second application for postconviction relief on April 14, 2009, again asserting ineffective assistance of trial counsel for failure to object to the felony-murder jury instructions and its submission as an alternative offense. His application is predicated on the Iowa Supreme Court's ruling on August 25, 2006, in *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), which overruled prior cases that had held an act constituting willful injury, causing the victim's death,

¹ This assaultive crime has since been retitled in 2002 as "[i]ntimidation with a dangerous weapon," continuing to be set forth in Iowa Code section 708.6.

could serve as the predicate felony for felony-murder purposes. The court stated, “We now hold that, if the act causing willful injury is the same act that causes the victim’s death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes.” *Heemstra*, 721 N.W.2d at 558.

The State filed a motion for summary disposition of Dao’s second application for postconviction relief upon the ground that it was untimely under Iowa Code section 822.3. The district court concluded Dao’s application had been filed more than three years after procedendo issued from his direct appeal, and he had not set forth a ground of fact or law that could not have been raised during the three-year time period. See Iowa Code § 822.3. Accordingly, the second application was dismissed as untimely. Dao now appeals.

II. Standard of Review

Our review of a district court ruling dismissing a postconviction action as time-barred by section 822.3 is for the correction of errors at law. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003). To the extent constitutional issues are raised, these must be reviewed do novo. *Lopez-Penalzoza v. State*, 804 N.W.2d 537, 541 (Iowa Ct. App. 2011).

III. Merits

A. Applications for postconviction relief “must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued.” Iowa Code § 822.3. There is an exception in the statute to this time limitation for “a ground of fact or

law that could not have been raised within the applicable time period.” *Id.* An applicant must additionally “show a nexus between the asserted ground of fact and the challenged conviction.” *Harrington*, 659 N.W.2d at 520. Where an application is filed beyond the three-year period and does not come within the exception, it may be dismissed as time-barred. *See Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994).

The procedendo was issued for Dao’s direct appeal of his conviction on June 28, 2001. The subject application for postconviction relief was filed on April 14, 2009, almost eight years thereafter, which is clearly beyond the three-year time limit found in section 822.3. In order to avoid the three-year time limitation, Dao needs to assert a ground of fact or law that could not have been raised within this time period. *See Perez v. State*, 816 N.W.2d 354, 360 (Iowa 2012).

Dao acknowledges his second application for postconviction relief was filed beyond the three-year period, but contends the failure of defense counsel to object to the felony-murder instructions submitted at trial, on the premise later adopted in *Heemstra*, qualifies as an exception to the time limitation in section 822.3.²

The district court aptly considered this issue:

² Dao does not argue that *Heemstra* should be applied retroactively. The Iowa Supreme Court specifically made the ruling prospective only, stating: “The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court.” *Heemstra*, 721 N.W.2d at 558. Subsequent decisions have also determined that the ruling in *Heemstra* only has prospective application. *See State v. Ragland*, 812 N.W.2d 654, 658 (Iowa 2012); *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009). The United States Supreme Court has acknowledged that the federal constitution does not require a state’s highest court to make retroactive any new construction of a state criminal statute. *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973).

The problem with this argument is that it fails to acknowledge the line of cases that led up to *Heemstra* that would have alerted trial counsel that such an argument (the scope of predicate offenses under the felony-murder rule) was potentially viable. At the time of the underlying trial of the applicant's case, the issue of the validity of the felony-murder rule, as applied to predicate offenses such as willful injury, had already been analyzed by the Iowa Supreme Court on at least four prior occasions: *State v. Beeman*, 315 N.W.2d 770 (Iowa 1982); *State v. Mayberry*, 411 N.W.2d 677 (Iowa 1987); *State v. Ragland*, 420 N.W.2d 791 (Iowa 1988); and *State v. Rhomberg*, 516 N.W.2d 803 (Iowa 1994). The prior criticism of the felony-murder rule that was eventually adopted in *Heemstra* was equally available to counsel in the applicant's case during the three-year period established in § 822.3. Accordingly, this was a ground that could have been urged during this period.

We agree with the district court's conclusions. "Section 822.3 creates an exception for untimely filed applications if they are based on claims that 'could not' have been previously raised because they were not available." *Wilkins*, 522 N.W.2d at 824. It is clear that the contest of the integrity and applicability of the felony-murder rule was available as a viable attack on that rule at the time of Dao's trial in 1999, identified and measured by other cases that had raised this issue prior to *Heemstra*. See, e.g., *State v. Escobedo*, 573 N.W.2d 271, 279 (Iowa Ct. App. 1997); *State v. Rhode*, 503 N.W.2d 27, 40 (Iowa Ct. App. 1993); *State v. Hughes*, 457 N.W.2d 25, 28-29 (Iowa Ct. App. 1990).

We conclude Dao has not propounded "a ground of fact or law that could not have been raised within the applicable time period." See Iowa Code § 822.3. His application is untimely under the three-year time limitation found in the relevant code section.

B. Dao additionally contends that section 822.8 offers him relief for his failure to file within the statutory limitation. This section provides:

All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Iowa Code § 822.8.

Dao asserts the employment of the "sufficient reason" language in section 822.8 modifies the language in section 822.3, the latter only allowing an exception to the three-year time period for issues that "could not" have been raised within the applicable time period. Dao argues under section 822.8, an issue may be raised that would otherwise be untimely under section 822.3 if there is "sufficient reason" for the issue not to have been raised in a timely manner.

The Iowa Supreme Court has reasoned there is an essential and qualifying distinction between sections 822.3 and 822.8. *Wilkins*, 522 N.W.2d at 824. "Whereas the language of section 822.8 presumes a timely filed application for postconviction relief and the prior availability of a claim, the language of section 822.3 clearly does not." *Id.* Thus, the "sufficient reason" language in section 822.8 only applies to postconviction applications that are timely under section 822.3.

We affirm the decision of the district court dismissing Dao's second application for postconviction relief as untimely.

AFFIRMED.

